Quantum Electric, Inc., *and* International Brotherhood of Electrical Workers, Local Union 441, International Brotherhood of Electrical Workers, AFL–CIO and International Brotherhood of Electrical Workers, Local Union 11, International Brotherhood of Electrical Workers, AFL–CIO. Cases 21–CA–31670 and 21–CA–31729

June 3, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND MEISBURG

On December 8, 2003, Administrative Law Judge Lana H. Parke issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed cross-exceptions and an answering brief, and the Respondent filed an answering brief and a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions[1] and to adopt the recommended Order as modified.[2]

[1] We agree with the judge, for the reasons stated in her decision, that the Respondent violated Sec. 8(a)(3) and (1) of the Act when it discharged employee Damir Tomas for wearing a T-shirt with union insignia and refusing to turn the T-shirt inside out. In its exceptions, the Respondent argues for the first time that its ban on such clothing was justified by "special circumstances." See generally *UPS*, 312 NLRB 596, 597 (1993), enf. denied 41 F.3d 1068 (6th Cir. 1994). Even if the Respondent's pro se status could excuse its failure to present evidence in support of a "special circumstances" defense at the hearing, the Respondent's exceptions proffer no additional facts that would support its position.

[2] We shall modify the judge's recommended order to provide for Tomas's reinstatement, as requested by the General Counsel in his cross-exceptions. *Dean General Contractors*, 285 NLRB 573 (1987). The availability of continued employment for Tomas, as well as the effect of the passage of time on Tomas's right to reinstatement, are matters that can be left to compliance. Although Chairman Battista and Member Meisburg have substantial doubts as to whether *Dean General Contractors* was correctly decided, they will leave to compliance the question of whether Tomas, if he had not been discharged, would have continued to be employed by the Respondent and whether he would have been referred to subsequent jobs. This will, in turn, determine the amount of backpay and whether reinstatement is warranted.

We shall also substitute the Board's standard language for portions of the judge's recommended notice.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Quantum Electric, Inc., Los Alamitos, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 2(a) and reletter the remaining paragraphs accordingly.

"(a) Offer Damir Tomas immediate reinstatement to his former job, or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed."

2. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. June 3, 2004

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Ronald Meisburg, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT prohibit employees from wearing clothing showing their support for International Brotherhood of Electrical Workers, Local Union 441, International Brotherhood of Electrical Workers, AFL–CIO or any other labor organization.

WE WILL NOT terminate any employee for refusing to comply with an unlawful order prohibiting protected activity such as wearing clothing showing support for International Brotherhood of Electrical Workers, Local Union 441, International Brotherhood of Electrical Workers, AFL–CIO or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Damir Tomas immediate and full reinstatement to his former job, or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed.

WE WILL make Damir Tomas whole for any loss of earnings and other benefits resulting from his termination.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful termination of Damir Tomas and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the termination will not be used against him in any way.

QUANTUM ELECTRIC, INC.

Amy Silverman, Esq., for the General Counsel.
Michael J. Swanson, of Los Alamitos, California, for the President, Quantum Electric, Inc.
Jessica Losch, for the Secretary-Treasurer, Quantum Electric, Inc.
Ray Van Der Nat, Esq., of Los Angeles, California, for the Charging Party, Local 441.
Larry Henderson, of Los Angeles, California, for the Organizer Charging Party, Local 11.

DECISION

STATEMENT OF THE CASE

LANA H. PARKE, Administrative Law Judge. Pursuant to charges filed in 1996[1] by International Brotherhood of Electrical Workers, Local Union 441, International Brotherhood of Electrical Workers (Local 441) in Case 21–CA–31670, and a charge filed by International Brotherhood of Electrical Workers, Local Union 11, International Brotherhood of Electrical Workers (Local 11)[2] in Case 21–CA–31729, the Regional Director for Region 21 of the National Labor Relations Board (the Board) issued an order consolidating cases, consolidated complaint and notice of hearing (the complaint) on June 5, 1997, alleging that Quantum Electric, Inc. (Respondent) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act).[3] The consolidated case was tried in Los Angeles, California, on July 14 and 15, and September 16, 2003.

Issues

1. Did Respondent violate Section 8(a)(3) and (1) of the Act by the following conduct:

(a) In July, terminating employee Leandro Cornejo (Cornejo)?

(b) On August 2, terminating employees Gonzales, Koenig, McCloyn, Juan Lozano (Lozano), and Sam Palazzola (Palazzola)?

(c) On August 2, terminating employees Gonzales, Koenig, McCloyn, Juan Lozano (Lozano), and Sam Palazzola (Palazzola)?

(d) On September 9, refusing to hire or consider for hire Jeff Clark (Clark)?

(e) On October 24, terminating employee Damir Tomas (Tomas)?

(f) Since November 20, failing and refusing to reinstate employee Mike Kaspar (Kaspar) to his prestrike position of employment?

2. Did Respondent independently violate Section 8(a)(1) of the Act between June and October by the following conduct:

(a) Threatening employees with termination because of their union activities?

(b) Threatening employees with refusal to hire because of their union activities?

(c) Interfering with employees by stating that if employees joined the Union, they would be unemployed for months?

(d) Interfering with employees by telling an employee not to join the Union?

(e) Interfering with employees by forbidding an employee to discuss or negotiate wages on behalf of fellow employees?

(f) Interfering with employees by directing employees to disavow an employee association?

(g) Interrogating employees about their union activities or the union activities of other employees?

(h) Creating the impression of surveillance of employees' union activities?

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Respondent, and Local 441, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a California corporation, with a facility in Los Alamitos, California (the facility), engages in the business of electrical construction. During a representative 12-month

[1] All dates are in 1996 unless otherwise noted.

[2] Local 441 and Local 11 are herein collectively called "the Union."

[3] Counsel for the General Counsel amended the complaint at the hearing to allege Curt Cramer, foreman, as a supervisor, which Respondent admitted, and to reflect the correct names of Brian Krause and Mark Carey, supervisors. Counsel for the General Counsel further amended the complaint to allege that in July 1996 Respondent, through Curt Cramer, created the impression of surveillance of employees' union activities and threatened an employee with termination because of his union activities, both of which allegations Respondent denied.

period ending December 31, it purchased and received at its facility goods valued in excess of $50,000 directly from suppliers located outside the State of California. Respondent admitted and I find it to be an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent stipulated at the hearing, and I find, that Local 441 and Local 11 are labor organizations within the meaning of Section 2(5) of the Act.[4]

II. ALLEGED UNFAIR LABOR PRACTICES

A. Respondent's Business and Supervisory Structure

The Respondent is a nonunion electrical contractor. In 1996, Respondent was engaged in performing electrical construction work at five to seven major projects with a total electrical employee complement of 18 to 25. Three of the projects were the USC Institute of Genetic Medicine located at the USC Medical Center on Mission and Soto Streets in Los Angeles (the USC site), the California Medical Center in downtown Los Angeles (the Cal Med site), and the AMC movie theater complex in Long Beach (Long Beach site). Respondent employed approximately 10 electrical employees at the USC site and approximately 10 electrical employees at the Cal Med site whose shifts fell variously between the hours of 6:30 a.m. and 3:30 p.m. Vaccaro served as foreman at the USC site and Cramer at the Cal Med site.

The following individuals, employed by Respondent at relevant times in the following positions and locations, were supervisors within the meaning of Section 2(13) of the Act:

Jessica Losch (Losch)	Co-owner and Secretary/Treasurer
Mike Swanson (Swanson)	Co-owner
Brian Krause (Krause)	Office Supervisor
Mark Carey (Carey)	Foreman (Long Beach site)
Steve Vaccaro (Vaccano)	Foreman (USC Medical Center site)
Curt Cramer (Cramer)	Foreman (California Medical Center site)

The above foremen were not responsible for granting time off, laying off, or discharging employees. Losch and Swanson exercised sole authority over those decisions.

B. Respondent's Attendance Policy and Practice

Respondent's policy regarding absenteeism and tardiness is set forth on its unsatisfactory performance warning form as follows:

> A record of absenteeism and tardiness is kept by the office. A combination of either [absenteeism or tardiness] can result in the termination of your employment. Three written warnings in a one month period will result in immediate termination. In the event of a medical or family crisis, a doctor's note, or a release from the management of Quantum Electric, Inc. is required to be excused from this written warning.
>
> All other absences or tardies can only be excused by the management of Quantum Electric, Inc.
>
> Upon the occurrence of the third unexcused absence or tardy in a 1 year period, a final written warning will be issued, and any occurrence thereafter [in] the 1 year period will result in termination.
>
> Any absence or tardy, regardless of the number of previous occurrences, in which the office has not been notified of the reason within 4 hours from the beginning of your scheduled work time, can result in immediate termination.

Respondent gave three absence-related warning notices to, and thereafter on April 3, terminated employee Gary Bletsch (Bletsch) for "failure to give advance notice to the office when leaving jobsite early or taking days off." Respondent issued a warning to Cornejo for tardiness on July 15, noting his excuse of a "flat tire" and a warning to Gonzalez on July 30 for absenteeism, noting his excuse of "no transportation" and that he had left a message on the office machine a half hour before his starting time.[5]

C. Union Activity at Respondent's Jobsites

As early as March, Local 11 engaged in organizational activities among Respondent's employees. During May and June, union organizer, Charles Turpin (Turpin) visited the USC and the Cal Med sites on several occasions and spoke to Respondent's employees about joining the Union. After one such visit to the USC site, Vaccaro told four or five employees, "I wouldn't join the union because they'll have you sitting on the books six to nine months, maybe even a year." On another occasion, Vaccaro asked Palazzola if he were "union." According to Lozano, following a May visit by Turpin to the Cal Med site, Cramer told Lozano to tell other employees not to talk to the Union; if they didn't stop, they would get fired. Cramer denied making any such threat to any employee. I was not impressed with Lozano's demeanor as a witness. Further, his testimony regarding the conversation was elicited piecemeal, which detracts from its credibility: in response to the first question, he answered that Cramer had "told me not to talk to the union guy," in response to the second, that Cramer had said "he didn't want us to be talking to the union," in response to the third, that Cramer had said "to tell the other guys not to talk about the union," and in response to the fourth, that Cramer "told me like, if we didn't stop talking about the union, we were going to get fired." The record shows that union representatives were an open presence at Respondent's jobsites at least May through August. Other than Lozano's testimony, there is no evidence of any managerial attempt to discourage employees from interacting with them during breaktimes. In these circumstances, I credit Cramer's denial.

By letters dated as follows, Local 11 notified Respondent that employees named below had signed union authorization cards or were members of Local 11 and would be engaging in union activities at work. Employee information sheets note the following dates and reasons for subsequent termination of employment:

[4] Where not otherwise noted, the findings herein are based on the pleadings, the stipulations of counsel, and/or unchallenged credible evidence.

[5] These were the only pre-August 2 warnings introduced into evidence.

Employee Name	Date of Letter	Date & Reason for Termination
Ron Houston	March 9	3/23 Unstated
Gary Bletsch	March 27	4/3 Failure to give advance notice [of absence]
Carlos Gutierrez	May 14	5/17 Quit. Better job offer from Union
Carlos Ayala	May 14	5/17 Quit. Better job offer from Union
Randy C. Gallegos	August 7	8/8 Quit, joined the Union
Mr. Manriquez	August 7	8/8 Quit . . . to join the Union
Osvaldo Sosa	August 7	8/8 Quit, joined the Union
Michael Keas	August 7	8/8 Quit, joined the Union
Curt Spencer	Sept. 9	9/13 Quit without notice—Union had job for him[6]

D. The Termination of Cornejo

In July, the Union held an informational meeting at the union hall about four or five blocks away from the USC site beginning at about 3:30 p.m. (the July meeting). Cornejo asked Vaccaro if he could leave work early from the USC site to attend the July meeting. Vaccaro gave permission. On a day following the July meeting, according to Cornejo, Vaccaro asked Cornejo how the meeting was; Cornejo said it was fine. Vaccaro told Cornejo that if he attended another meeting, he needed to give advance notice, in Cornejo's words, "two months notice or something like that."[7]

According to Cornejo about 2 weeks later on July 17, Vaccaro again mentioned the union to him. Cornejo initially testified that Vaccaro asked for news of a postal service employment test Cornejo had taken and said if he went "to vote the union, [Vaccaro] is going to replace me for somebody else." Later Cornejo testified, "[Vaccaro] told me if I—if I go to the union or to another job, that he's going to replace me before—before I get to know the [post office test] results." I find the statements attributed to Vaccaro ambiguous. It is not clear Vaccaro was warning Cornejo that supporting the union would result in his discharge, an unquestionably unlawful threat. Respondent appears to have described employees' actions in quitting to obtain employment covered by a union contract as "joining the union." Vaccaro's statement could thus be understood as a warning to Cornejo that if he voluntarily left Respondent's employment for another job, Respondent would replace him, a lawful admonition. I cannot find, based on Cornejo's account, that Vaccaro made any antiunion threat or even expressed union animus.

At the end of Cornejo's shift on the same day as his conversation with Vaccaro, Vaccaro told him to pick up his tools and leave. Cornejo contacted Losch and asked why he had been fired. Losch told him it was a reduction-in-force.[8] Losch signed a letter dated July 17 that reads, "To whom it may concern: Leandro Cornejo was laid off due to a reduction in forces on July 17, 1996. His last day worked with Quantum Electric Inc. was July 17, 1996."

E. The August 2 Union Meeting and Consequent Employee Discipline

Sometime prior to August 2, the Union announced a meeting would be held at the union hall on August 2 at 2 p.m. (the August meeting), during Respondent's normal work schedule. Union representatives advised Respondent's employees they needed to attend the meeting to get information on joining the Union.[9] No one explained why the Union scheduled the meeting to conflict with Respondent's work hours, but attendance did require Respondent's employees to leave work early. Various employees from either the USC or the Cal Med site left work early to attend the August meeting in the following circumstances:

> *McCloyn*. Following a morning employee meeting with Vaccaro at the USC site, McCloyn asked Vaccaro's permission to leave early to go to the union hall. Vaccaro directed him to inform Respondent's office. At about 8:45 a.m., Vaccaro told employees they did not have to call the office because he already had, and the company required each of them to sign a document entitled "Unsatisfactory Performance Warning" (performance warning) before they could leave work.[10] Explanation line C ("Leaving before end of scheduled work period") was marked.[11] Vaccaro explained the performance warning was a reprimand for leaving early. McCloyn and Gonzales signed the performance warning at that time. At about 1:55 p.m., the employees left work and attended the union meeting. McCloyn had never before left work early.
>
> *Gonzales*. At about 8:00 or 9:00 a.m. at the USC site, Gonzales asked Vaccaro if he could leave work early. Vaccaro said, "Oh, you're going to the Union, too . . . you'd only be hurting the company. Probably be burning your bridges."[12] As to Gonzales' leaving early, Vaccaro

[6] Respondent referred to employees quitting to obtain employment on union-signatory jobsites as "quit[ting] to join the union" or "join[ing] the union."

[7] I do not accept Cornejo's vague testimony as to how much advance notice Respondent required. I also find it reasonable to infer that Vaccaro meant advance notice would have to be given to attend any meeting scheduled during working hours and that Cornejo understood him to mean that.

[8] Respondent's practice was to lay off employees at the end of their work shifts without "much notice at all . . . [out of] concerns that employees might not react well."

[9] Gonzales testified that Turpin told employees to come for a "placement test," but Lozano testified that at the meeting union leaders only told employees about the advantages of union membership.

[10] The performance warning set forth Respondent's attendance policies as detailed supra.

[11] McCloyn testified that no explanation line was marked when he signed the performance warning. I attach no significance to McCloyn's testimony.

[12] I do not infer union animus from Vaccaro's statements. In the circumstances, I believe they are susceptible of a lawful meaning. Prior to August, Respondent had experienced a number of employees leaving its employ to obtain union-represented jobs (Carlos Gutierrez, Ron Houston, Carlos Ayala). Vaccaro's words could reasonably be taken to mean that if Gonzales followed that pattern, his leaving would hurt the company by depriving it of yet another experienced worker. As to the "burning your bridges" statement, such might also reasonably be taken to mean that union membership restrictions, not retaliation, could limit

said something to the effect that he had already discussed it with the office. At about 1:00 p.m., Vaccaro presented Gonzales with a performance warning, explaining that Gonzalez had to sign it for leaving without authorization, which Gonzales did. Gonzales left work at about 1:45 p.m. to attend the union meeting. At about 6:00 p.m., Swanson telephoned Gonzales at home and told him he was fired because he left work early.

Koenig. Koenig did not testify. He worked at the USC site as of August 2. He signed an Unsatisfactory Performance Warning on August 2 issued for "Leaving before end of scheduled work period." In the reason-for-termination section of Koenig's Employee Information Sheet, the words "Left job early without prior notice to the office" are crossed through and replaced with "Reduction in work force. We had check prepared and sent to job and he had left before quit time and we could not give him his final check." He was rated ineligible for rehire because he left work early.

Palazzolo. On the day prior to the August meeting, according to Palazzolo who was working at the Cal Med site, he telephoned Respondent's office and informed Kerry McFarland (McFarland), office manager, that he had to leave work early the following day. There is no evidence Respondent approved Palazzolo's prospective absence. On the morning of August 2, Palazzolo told Tom Hooper (Hooper) who was filling in for Cramer at the Cal Med site that he had already told the office he was leaving early. Palazzolo left at about noon to attend the union meeting. That evening Swanson telephoned Palazzolo and said he was laying him off. Palazzolo asked whether it was for leaving early or for a reduction in force. Swanson said it was a reduction in force.[13] Palazzolo telephoned Losch and protested his discharge; Losch said work was slow. Palazzolo's Employee Information Sheet states the reason for termination, "Reduction in work force. Left job early before lay off check arrived." He was rated ineligible for rehire because he left work early.[14]

Lozano. Lozano told Hooper he had to leave early that day for an appointment. Hooper said he would call the office. Hooper never got back to Lozano. Lozano and Palazzola left the Cal Med site at about 11:30 a.m. to attend the Union meeting. Before he left, Lozano told Hooper he was leaving, and Hooper said, "Okay." That evening, Swanson telephoned Lozano and asked why he had left work early. Lozano said he went to a union meeting. Swanson told Lozano he was fired for leaving early. Following Swanson's call, Lozano called Losch and told her he wanted his job back. She said Respondent was going to have a meeting to discuss employees' terminations, and she would get back to Lozano, but she never did. On prior occasions, Lozano had obtained permission to leave work early for various reasons without repercussion.

Peter Manriquez (Manriquez). Manriquez apparently also left early to attend the August meeting. No evidence was presented regarding the circumstances of his leaving. Manriquez's Employee Information Sheet shows he received a written warning on August 5 for "leaving the job early without prior notice on 8-2-96," and that he voluntarily terminated employment on August 8 "to join the Union."

Respondent sent a "Notice of Termination" dated August 2 to McCloyn, Gonzales, and Lozano, which stated that each had been "terminated from employment with Quantum Electric, Inc. as of August 2, 1996. Cause of termination is leaving job without authorization."

Respondent sent Palazzola a "Notice of Termination" dated August 2, which read: "Samuel Palazzola has been terminated from employment with Quantum Electric, Inc. as of August 2, 1996. Cause of termination is reduction in forces."

F. Respondent's Clothing Policy

Prior to August 8, Respondent did not require employees to wear specified work clothing. Some employees wore T-shirts with logos such as "Nike" or designs on them. On August 8, Respondent issued a memorandum to employees (clothing policy memo) that stated, in pertinent part:

> Clothing shall not have excessive wear (ie. holes, tears, rips) graphics or printed text other than Quantum Electric, Inc. approved or issued clothing.
>
> Hard hats shall not have any attached decals or graphics. Quantum Electric, Inc. excepted. Name identification shall be made with removable label only, ie. Dymo, Avery, P-Touch.

G. Clark's Unsuccessful Application for Employment

On August 27, Clark, an 18-year member of Local 441, applied for a job with Respondent upon the advice of a Local 441 organizer. Another individual, Rudy Carr (Carr) applied for work at the same time. After completing his application, on which he stated his membership in Local 441, Clark took Respondent's 49-question test, missing five.[15] Clark observed that Carr was called into Respondent's office for an interview, presumably with Losch. When he came out, in response to Clark's inquiry, Carr said he had been hired. Losch then interviewed Clark for about 20 to 30 minutes, asking him, among other things, whether he was there to organize for Local 441 and stating that Local 11 had taken a couple of her key people.[16] Losch pointed out that Respondent started their journeymen at $15 an hour, and asked how Clark could work for so low an

future employment. The reasonableness of such an interpretation is reinforced by Vaccaro having earlier told employees the union could have them "sitting on the books six to nine months, maybe even a year." That Respondent had no retaliatory intent is demonstrated by its having marked Carlos Gutierrez and Carlos Ayala, who quit because of a "better job offer from Union," as "rehirable."

[13] Palazzola's testimony in this regard was not consistent. He initially testified that Swanson said he was laid off because he left early and only after Palazzola's objection changed the reason to a work reduction.

[14] Losch testified Respondent decided to lay off Palazzola before its managers were aware he had left the job early.

[15] Respondent's average applicant missed 12 to 14 questions.

[16] I take Losch's statements to mean that key employees had quit to take union-represented employment.

amount.[17] Clark said he was near the bottom of Local 441's out-of-work list and was looking for work. Losch said she would call him if Respondent could put him to work. Following the interviews, Losch noted on Clark's application that he was eligible for a wage rate of $15 per hour. Respondent's records show it hired the following employees on the following dates at the following wage rates:

Carr	August 28[18]	$14.00 per hour
Mike Kaspar	Sept. 3	$15.00 per hour
Robert Wilson	Sept. 5	$14.00 per hour
Donald Low	Sept. 16	$14.00 per hour
Stewart Gonzales	Sept. 25	$15.50 per hour

In determining whether to hire an applicant, Losch considered a combination of factors such as test results, the applicant's experience and knowledge of the trade, past work, and her assessment of the applicant's responsiveness and motivation. Respondent also "[went] for the lower wage rate in many . . . cases."

On September 6, Clark telephoned Respondent and asked if he could be employed. The person answering reported that Losch said she did not know her manpower needs. Clark contacted Respondent again on September 9 and asked Losch if Respondent could put him to work. According to Clark, Losch said not at that time as Respondent had problems with "somebody trying to form an employee association."[19] I do not credit Clark's testimony of his September 9 conversation with Losch. Not only was I unimpressed with Clark's manner while testifying, I find his account lacks inherent congruity. There is no evidence that Losch made any negative statements regarding the employee association to anyone, and there is nothing in prior communications between Losch and Clark, all of which were brief and noncommittal, to suggest she would impart such a concern to him.

H. The Employment and Union Activity of Kaspar

On about August 28, Kaspar applied for employment with Respondent. Kaspar was at the time a paid organizer for Local 441 and sought employment with Respondent for the purpose of "salting"[20] but did not disclose his union affiliation. Losch interviewed him briefly, saying she was thinking about hiring soon, and asked him if he would work for $15 an hour, Respondent's journeyman rate. The next day when Kaspar said he was willing to work permanently, Losch hired him.

Respondent assigned Kaspar to the Long Beach site. According to Kaspar, on his first day, Carey asked him if he were in the union. Kaspar said he had been a member of Local 441 since 1988. Kaspar faxed Respondent a letter dated September 3, as follows in pertinent part:

> This is to inform you that I am a member of [Local 441]. I have made it known to some workers who asked, that I am indeed union. I plan on talking to workers of Quantum Electric about the benefits of being in the union. I believe that the union can be of great benefit not only to the workers but to the company as well.

The following day, according to Kaspar, Carey asked him if he were talking to employees about the Union, saying the company had inquired. When Kaspar affirmed it, Carey said Kaspar needed to let him know which employees were interested in the union because he knew he would have to replace those employees. At lunchbreak that same day, Larry Henderson and Richard Cheeks, two organizers from Local 11, visited the jobsite, answered employee questions, and handed out "paperwork."

Although Kaspar's testimony is uncontroverted in this and other instances, I do not credit portions of his testimony, including the statements he attributes to Carey. Kaspar has figured in at least three other Board cases in connection with his "salting" activities, and he is clearly sophisticated in union organization and litigation matters. In one of the cases, he revealed significant animosity toward nonunion employers, which detracts from his credibility. See *W.D.D.W. Commercial Systems*, 335 NLRB 260, 268 (2001) wherein Kaspar was quoted, ". . . If we can't get the workers, bankrupt the contractors." In another case, Kaspar was found to be an unreliable witness. See *Montano Electric*, 335 NLRB 612, 619–620 fns. 13–15 (2001), where the administrative law judge specifically discredited Kaspar's testimony. I too did not find Kaspar to be a forthright or sincere witness, and specific incongruities in his testimony cause me to doubt his version of several events. With regard to his assertions about conversations with Carey, I note Kaspar's September 3 letter to Respondent does not mention Carey's alleged interrogation. Had Carey interrogated Kaspar, I am certain he would have detailed it in his letter. His failure to do so casts doubt on his testimony. Moreover, when questioned about his testimony in prior NLRB hearings, he said he "[didn't] know" if his testimony had ever been discredited. It is improbable Kaspar was ignorant of the findings in *Montano*, and I find his testimony disingenuous at best. Finally, I find Kaspar's testimony that Carey, on September 4, asked him which employees he had talked with about the union, saying he would have to replace them, inherently implausible. There could be no reason for Respondent to ask if Kaspar were talking to employees about the union as he had just notified them of that fact in writing, and employees' union activity had been open and notorious. Union representatives visited the jobsites regularly, joined employees at breaks, and distributed literature, all of which must have been apparent to management. Indeed, Kaspar included Carey in his activities. As related below, Kaspar gave a newly drafted employee association form to Carey who said it "looked good." Carey's approving response is inconsistent with the threats Kaspar ascribes to him. Finally, in explaining his reasons for engaging in a strike (described hereafter) to Carey, Kaspar, by his own account, did not

[17] Clark estimated that the journeyman rate under the union contract was $25 or $26 an hour at that time.

[18] Although the written record shows Carr's hire date to be August 28, Carr was, according to Clark's testimony, offered the job on August 27, prior to Clark's interview.

[19] The circumstances surrounding the formation of the employee association are described below.

[20] "Salting . . . involves members or organizers of a local union applying for work at nonunion employers engaged in the construction and electrical contracting industry in order to organize the employer's employees." *Corporate Interiors, Inc.*, 340 NLRB No. 85, slip op. at 5 (2003).

include any of Carey's alleged behavior as an "unfair labor practice." His failure to do so casts further doubt on the veracity of his account. Accordingly, as to this and other testimony noted below, I have declined to accept Kaspar's statements.

I. The Employee Association

In early September, after talking to employees at the Long Beach site about wages and working conditions, Kaspar suggested employees form an association and work together to improve working conditions. On September 9, he created application forms for the so-called Quantum Electric employee association, which provided space for name, address, phone number, and areas of employment concerns, and read as follows in pertinent part:

> Employees of Quantum Electric are forming an Employee Association. This association will work to improve working conditions for all field electricians working for Quantum. If you would like to join, or have more information please contact Mike Kaspar who is an employee of Quantum and is currently assigned at AMC Theater in Long Beach. Please fill out the enclosed information sheet and send it to . . . Mike Kaspar . . . .

On the following day, Kaspar disseminated the forms to workers and to Carey who said it looked good to him. Kaspar drew up another version of the application form, stating the goals of the association and claiming that interest among some employees was high "despite management's attempts to discourage membership," and disseminated that at work as well. On that day or the next, Krause came to the Long Beach site with a document for employees to sign. According to Kaspar, Krause said the purpose of the document was to let employees know that Respondent wanted nothing to do with an employee association, that they were not condoning it, and they didn't want it to exist.[21] Six employees including Carey signed the document, dated September 6, which read:

> One of our employees is in the process of trying to form an employee association under the name of "Quantum Electric Employee Association." The management of Quantum Electric, Inc. has no affiliation, does not authorize, or sanction the use of the name Quantum Electric in any association.
>
> Quantum Electric, Inc. does not allow any association to conduct its business during scheduled work periods on our jobs except during scheduled coffee or lunch breaks.
>
> If you have any questions about associations or organizations that appear to be associated or doing business with our Company, please feel free to call any of Quantum Electric, Inc. management.

On September 10, Kaspar telephoned Losch after work and told her employees felt Respondent should raise its wages to be more in line with other nonunion contractors in the area, and suggested a $2-per-hour raise for journeymen and a $1-per-hour raise for apprentices. According to Kaspar, Losch said, "You have no right to speak to any of the other workers about their wages. If you want to talk about your own wage, that's fine. If you're not happy with the amount of money that you're making here, you're free to quit, and the other employees, if they're not happy making what I'm paying them, then they're free to quit also, but you have no right to discuss other people's wages with them or with me." Kaspar said he intended to continue speaking to employees, that they wanted a democracy not a dictatorship. According to Kaspar, Losch said Respondent would stick with its policy and that Kaspar was not allowed to speak to her on behalf of other employees. Although Losch had no independent recollection of this conversation, she identified a memorandum she had prepared for Respondent's attorney on September 12 in which she memorialized the conversation as follows:

> Mike Kaspar called me at the office around 4:15 pm on Tuesday afternoon on Sept. 10, 1996. He stated he was representing several employees as a representative of the Quantum Electric Employee's Association. He stated that our wages were below industry averages, even for non-union employees. I told him if he felt he merited a raise, that the procedure presented to him in his job orientation meeting with me was: after one month with the company he could request an evaluation from his supervisor and we would evaluate whether or not there was a change in his status that would merit a raise. He restated that he was not seeking a personal merit raise for himself, but was requesting general raise[s] for all employees, $1 for apprentices and $2 for journeymen. I restated to him, according to our company policy, each employee must make their own individual request for an evaluation for a wage increase and that the company does not recognize his request for any other employee than himself. He said, do you want me to tell the employees you are dictator and this is not a democracy. I said you may tell them what you wish. He came back to his original request of a raise for the employees and I referred again to the company policy, told them [sic] that this conversation was just going around and around and it was time to end it. I also told him if had future concerns to discuss them with his supervisor or he could call us.[22]

J. Kaspar's Strike

Kaspar commenced a strike against Respondent, which he characterized as an "unfair labor practice strike." By fax dated September 12, he informed Respondent, "I, Mike Kaspar, am on strike as of 9-12-96, due to violations of workers rights under the National Labor Relations Act. I am not quitting my job. I am on strike." The following morning, by telephone, Carey told Kaspar that Respondent had informed him Kaspar was on an economic strike because of wages. Kaspar said the strike was for Respondent's violations of employee rights, including the interrogation of Clark during his employment interview, Losch's telling him he could not discuss other workers' wages with her and that he had no right to be involved in what their pay practices were, and his awareness of the termination of employees from another jobsite because of their union activi-

[21] I do not credit Kaspar's testimony as to what Krause said.

[22] I credit Losch's memorialized account of her September 10 conversation with Kaspar.

ties. Carey asked how long Kaspar would be out on strike; Kaspar said he did not know.

By letter dated September 12, Losch wrote to Kaspar as follows:

> The Company is in receipt of your September 11, 1996 and September 12, 1996 letters in which you claim to be on strike from the Company due to alleged "violations of workers rights under the National Labor Relations Act."
>
> The Company has not engaged in any unlawful conduct. You are an economic striker. Accordingly, the Company has the legal right to replace you.
>
> If you do not report for work at the Company's [Long Beach site] within three (3) working days of your receipt of this letter, the Company intends to replace you. If you elect to report for work within the period described above, you will be assigned to the job duties you performed on your most recent day of work, September 11, 1996.[23]

Thereafter, Respondent filled Kaspar's position with another worker.[24] Kaspar picketed the Long Beach site, sporadically, over the next 2 months. Kaspar picketed on about six occasions in all and was sometimes joined by two Local 11 organizers.

By personal delivery of a letter dated November 19, 1996, to Respondent's office Kaspar offered to return to work, as follows:

> This is to inform you that I, Mike Kaspar, am offering to unconditionally end my Unfair Labor Practice Strike against Quantum Electric. I wish to return to work immediately. Please contact me as to where and when to report to work.

Respondent did not answer Kaspar's offer to return to work because Swanson and Losch believed he had quit his job in September when he failed to return to work. After sending his letter of November 19, Kaspar called to speak to Losch and an unidentified male speaker told him that Losch said he had been replaced and there was no longer a job available for him. Respondent's records show only two hires after November 19 at the following wage rates: (1) Fernando Espinoza—$7, (2) Steve Easton—$20.

K. Respondent's Discharge of Tomas

When Respondent hired Tomas on September 19 to work on the Cal Med site, he signed Respondent's August 8 clothing policy memo. While working, he observed other employees wearing T-shirts with such logos as "Santa Anita" and "Marlboro." After a week on the job, Tomas wore T-shirts with "Nestle" or "UCLA" superscribed on them. Upon the conclusion of the Cal Med site job, Respondent transferred Tomas to the Long Beach site supervised by Carey. According to Tomas, employees at the Long Beach site wore T-shirts with such logos as "Harley-Davison." Losch and Cramer maintained that after issuance of the clothing policy memo, employees no longer wore logo-superscribed T-shirts. Cramer testified that after the policy issued, Respondent gave collared blue T-shirts to employees to wear.

In October, Turpin visited the Long Beach jobsite and talked about union benefits with a group of employees that included Carey. Turpin gave Tomas a T-shirt bearing a Local 11 insignia. On October 24, Tomas wore the Local 11 T-shirt to work. Carey told him he was not supposed to wear that shirt on the jobsite. Later, Carey told Turpin that Losch had said she would like him to turn the shirt inside out. Tomas refused, and Carey told him to go to Respondent's office. Tomas gathered his tools and reported to Respondent's office. Losch told Tomas that if he refused to turn the shirt inside out, he would be written up and after the second offense, he would be fired. Tomas said, "Well, I'm not going to do it." Losch gave him a performance warning form to sign and said she would mail him his check. The explanation checked on the performance warning form read "Violation of the company dress code." Losch's further written comment read, "Wearing T-shirt or hard hat with unauthorized labels or logo—employee came to office refused to turn shirt inside out because Union would not let him join if he didn't—Employee terminated for refusal to follow company policy."

III. DISCUSSION

A. Alleged Violations of Section 8(a)(1)

The General Counsel alleged at Paragraph 12 that Vaccaro violated Section 8(a)(1) of the Act when he (1) told employees if they joined the union, they would be unemployed for months, (2) threatened an employee with termination if he joined the union, and (3) told employees not to join the union. The first allegation relates to Vaccaro's having told several employees in June or July that he wouldn't join the union because "they'll have you sitting on the books [six months to a year]." In the Board's view, "generally, a supervisor may lawfully express his or her personal views of or experience with unionism," *Baddour, Inc.*, 281 NLRB 546, 548 (1986). Further, "The Act does not preclude a supervisor from expressing opinions or pronouncing antipathy to unions so long as the statements are not coercive [footnote omitted]." *Wilker Bros. Co.*, 236 NLRB 1371, 1372 (1978). It is clear Vaccaro merely stated his reasons for not wanting to join the union and his opinion that membership might result in an employee remaining on the union's out-of-work list and unemployed for significant periods of time. There was nothing in Vaccaro's statement to suggest Respondent would take any unfavorable action toward employees. I find Vaccaro's statement reflected his personal opinion and was uncoercive. As to the remaining allegations relating to Vaccaro, there is no credible evidence to support them. Accordingly, I shall dismiss these allegations of the complaint.

The General Counsel alleged at paragraph 13 that Losch violated Section 8(a)(1) of the Act when she (1) interrogated applicants about their union activities, (2) threatened that union-affiliated applicants would not be hired because of their union activity, and (3) forbade an employee from discussing or negotiating on behalf of fellow employees regarding wages.

[23] Counsel for the General Counsel characterizes this letter as placing a time limitation on Kaspar's strike. However, the letter only gives a deadline beyond which Kaspar will be permanently replaced.

[24] Although Losch could not recall specifically who was hired to fill Kaspar's position, she testified that anyone hired after September 12th could have been slotted into Kaspar's vacant position.

As to the first allegation, during Losch's interview of Clark, she asked him if he were applying in order to organize for the union. The Board's test of an interrogation in violation of Section 8(a)(1) is "whether, under all the circumstances, it reasonably tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights . . . ." Among the factors to be considered are the background of the questioning, the nature of the information sought, the identity of the interrogator, and the place and method of the questioning.[25] I find in the instant circumstances that Losch's question was not coercive. Clark applied for employment at Local 441's suggestion and openly listed himself as its member. No hostility or threat, explicit or implied, accompanied Losch's question. The question itself along with Losch's query as to how Clark could work for so low an amount suggests Losch was attempting to ascertain if Clark had a sincere desire for employment with Respondent. I recognize that "motive or intent in making [a] statement has no relevancy in an 8(a)(1) context . . ." and that lawfulness "does not depend on motive or the successful effect of the coercion," *Exterior Systems, Inc.*, 338 NLRB No. 82, slip op. at 4 (2002). However, viewed objectively and in context, Losch's question reflects an innocuous and legitimate business concern unlikely to restrain, coerce, or interfere with an employee's rights guaranteed under the Act. Losch accepted Clark's response "without objection or further probing."[26] I conclude, therefore, that Losch did not violate the Act by asking Clark if he sought employment in order to organize for Local 441.

As to the second allegation, it presumably relates to statements Losch made to Clark, and I find she made no threat that union-affiliated applicants would not be hired.

As to the third allegation, it is undisputed that Losch declined to discuss the wages of other employees with Kaspar. Essentially, Kaspar sought to negotiate wages for other employees, and Respondent refused to do so. The General Counsel has not explicated why Respondent's refusal violates the Act. The Board does not require an employer to grant recognition to a union or to enter into a bargaining relationship voluntarily. See *Terracon, Inc.*, 339 NLRB No. 35, slip op. at 4 (2003). Presumably, the same reasoning applies to employee association attempts to achieve bargaining rights. As I have not accepted Kaspar's testimony that Losch told him he had no right to talk to other employees about their wages or that she forbade him from doing so, I find there is no evidence of any violation of the Act in Losch's interchange with Kaspar regarding employee wages.

The General Counsel alleged at paragraph 14 that Carey violated Section 8(a)(1) of the Act when he (1) interrogated employees about their and other employees' union activities and (2) created an impression of surveillance by directing an employee to inform him of the union activities of other employees. These allegations are based on the testimony of Kaspar, which I have discredited. Accordingly, I find no evidence that Carey violated the Act, and I shall dismiss the allegations of paragraph 14 of the complaint.

The General Counsel alleged at paragraph 15 that Krause violated Section 8(a)(1) of the Act when he directed employees to sign Respondent's written response to the formation of the employee association. The General Counsel does not allege the written response to be unlawful, and there is nothing in it of a restraining or coercive nature. The response merely notifies employees that the employee association is not affiliated with Respondent, although its title includes Respondent's name, and it lawfully instructs employees to conduct association business during appropriate nonwork periods. Employees were, again lawfully, requested to sign the response to signify they had read it. There is no credible evidence as to what Krause said when presenting the response for employee signature. Accordingly, I find no evidence that Krause violated the Act, and I shall dismiss the allegations of paragraph 15 of the complaint.

The General Counsel alleged at paragraph 16 (included by amendment at the hearing) that Cramer violated Section 8(a)(1) of the Act by creating the impression of surveillance of and threatening employees because of their union activities. The allegations are based on testimony of Lozano to the effect that Cramer said employees would be fired if they did not stop talking to the Union, which testimony I have specifically discredited. Accordingly, I find no evidence that Cramer violated the Act, and I shall dismiss the allegations of paragraph 16 of the complaint.

B. The Termination of Cornejo

The question of whether Respondent violated the Act in terminating Cornejo rests on its motivation. The Board established an analytical framework for deciding cases turning on employer motivation in *Wright Line*.[27] To prove that an employee was discharged in violation of Section 8(a)(3), the General Counsel must first persuade, by a preponderance of the evidence, that an employee's protected conduct was a motivating factor in the employer's decision. If the General Counsel is able to make such a showing, the burden of persuasion shifts "to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Wright Line*, supra at 1089. The burden shifts only if the General Counsel establishes that protected conduct was a "substantial or motivating factor in the employer's decision." *Budrovich Contracting Co.*, 331 NLRB 1333, 1333 (2000). Put another way, "the General Counsel must establish that the employees' protected conduct was, *in fact*, a motivating factor in the [employer's] decision." *Webco Industries*, 334 NLRB 608 fn. 3 (2001).

The elements of discriminatory motivation are union activity, employer knowledge, and employer animus. *Farmer Bros. Co.*, 303 NLRB 638, 649 (1991). Here, the first two elements are met. In July, Cornejo obtained permission from his supervisor to leave work early to attend a union meeting; hence,

[25] *SKD Jonesville*, 340 NLRB No. 11, slip op. at 2–3 (2003), quoting *Rossmore House*, 269 NLRB 1176, 1177 (1984) enfd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1995); *Sunnyvale Medical Clinic*, 277 NLRB 1217, 1218 (1985).

[26] See *West Maui Resort Partners*, 340 NLRB No. 94, slip op. at 6 (2003) (asking an employee how he felt about the union, in the circumstances, did not reasonably tend to restrain or coerce employees).

[27] *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

Cornejo was engaged in union activity, and Respondent knew of it. As to the third element, there is no significant, direct evidence that Respondent bore animosity toward Cornejo or any other employee for his union involvement or support. However, such direct evidence is not essential. In determining whether the General Counsel has met his initial burden of proving that an employee's protected activity was a motivating factor in an employer's decision to discharge the employee, the Board has held that "a discriminatory motive may be inferred from circumstantial evidence and the record as a whole, and that direct evidence of union animus is not required." *Tubular Corp. of America*, 337 NLRB 99, 99 (2001) (citations omitted).

There is no circumstantial evidence from which I can infer a discriminatory motive in Respondent's discharge of Cornejo. Respondent had a practice of laying off employees as business exigencies dictated. Evidence was adduced that in July, Vaccaro informed Swanson that work was slowing on the USC site and he was looking to lay off employees. There is no evidence that Cornejo's lay off was otherwise motivated. Considering all the evidence, I cannot find that Cornejo's protected activity was a motivating factor in Respondent's decision to lay him off. Accordingly, I find the General Counsel failed to meet his *Wright Line* burden, and I shall dismiss the allegations of the complaint relating to Cornejo.

C. Disciplinary Notices to Gonzales, Koenig, and McCloyn, and Terminations of Gonzales, Koenig, McCloyn, Lozano, and Palazzola

It is essentially undisputed that Respondent's stated reason for issuing disciplinary notices to Gonzales, Koenig, and McCloyn and for the later terminations of Gonzales, Koenig, McCloyn, Lozano, and Palazzola was their leaving work early on August 2.[28] It is also clear company management was generally aware of its employees' union activities and specifically aware the above employees left work early to attend a union meeting.

Under the *Wright Line* test described above, the General Counsel bears an initial burden of demonstrating that protected concerted activity was a motivating factor in Respondent's actions herein. There is no question that attending a union meeting is protected activity under the Act. If that were the disciplined employees' sole conduct herein, it would be a foregone conclusion that Respondent's disciplinary notices and terminations for the activity were unlawful. But attendance at a union meeting was not the employees' sole conduct. The five employees also left work early. In doing so, they were not engaging in a strike, withholding of work, or other permissible form of protest to demonstrate their disagreement with working conditions.[29] They simply ceased work early to facilitate attendance at a union meeting. Leaving work early is not protected activity even when the object of leaving is to engage in protected activity. See *House of Raeford Farms, Inc.*, 325 NLRB 463 at fn 2 (1998), where the Board found "insufficient evidence to support a finding that the employees were acting to protest mandatory overtime or any other term or condition of employment [when they left work early];" *Specialized Distribution Management, Inc.*, 318 NLRB 158 (1995), where employees left their building without permission to attend a union meeting while on the clock; *Bird Engineering*, 270 NLRB 1415 (1984), where the Board found employees' concerted violation of a rule prohibiting them from leaving the employer's facility during their work shifts to be unprotected; *Scioto Coca-Cola Bottling Co.*, 251 NLRB 766 (1980), where the Board said, "There must be some evidence on the record from whatever source that the activity engaged in was not only concerted but, more significantly, that it was . . . protected by Section 7 of the Act"; and *Crown Coach Corp.*, 155 NLRB 625 (1965), where employees left work to attend a union "demonstration meeting."

Although the employees' absenting themselves from work in the above circumstances was unprotected, Respondent's termination of them is defensible only if leaving work was the reason for the terminations. If Respondent's actual motivation was animosity toward employees' attendance at a union meeting, Respondent violated the Act when it disciplined and terminated the employees. After considering all the evidence and applying the shifting burden process mandated by *Wright Line*, I conclude that Respondent terminated its employees for leaving work early on August 2 without regard to their attendance at a union meeting. Or to put it another way, I conclude that Respondent would have terminated the five employees for leaving work early even if the employees had absented themselves to engage in wholly unprotected activity such as attending a sports event.

In reaching the above conclusion, I have reviewed several factors. I have considered that although Respondent knew of its employees' union activity, indeed had known of it for many weeks, there is no credible evidence of overt animosity by Respondent toward the activity. There is also no circumstantial evidence from which I can infer a discriminatory motive in Respondent's discharge of those employees who left early.[30] The five terminated employees left work on August 2 without following Respondent's customary procedure for approved absences, and none had permission to do so. Although, Palazzola notified McFarland on August 1, and the other four notified their foremen on August 2 of their intended absences, they did not obtain clearance from one of Respondent's managers, and Respondent evidenced its disapproval by requiring

[28] Respondent presented evidence that Koenig and Palazzola were coincidentally slated for work-force-reduction layoff on August 2 prior to their leaving early. Both were rated ineligible for rehire because they left work early. Because the evidence concerning their layoff pursuant to a reduction in work force is confused and because they were denied reemployment rights, I have considered that they, too, were terminated for leaving early.

[29] I am mindful that employees need not present a grievance or demand to an employer for a concerted work cessation to be protected. *Accel, Inc.*, 339 NLRB No. 134 fn. 3 (2003). However, there is no evidence and no contention here that employees left work as a protest.

[30] Counsel for the General Counsel argues that Respondent presented shifting defenses, which evidence discriminatory motive. Although Respondent's response to its employees' absences was neither prompt nor entirely direct, I cannot find union animus as its basis. Respondent was presented with unprecedented group employee conduct of leaving work early. In these circumstances, Respondent's handling of the situation was not so unreasonable as to show discriminatory motive.

McCloyn, Gonzales, and Koenig to sign performance warnings prior to their leaving early. As to Palazzola and Lozano, it is unclear if Acting Foreman Hooper communicated their intention of leaving early to management. Palazzola told Hooper he had already notified the office, but he did not say and there is no evidence he had permission to leave. Although Hooper said he would communicate Lozano's intention to leave early to the office, he never got back to Lozano. Accordingly, none of the five employees could reasonably have believed he had valid permission to leave the job early. I have further considered that the only evidence regarding Respondent's pre-August 2 attitude toward absenteeism shows Respondent to have enforced its attendance policies strictly. Thus, Respondent gave Gonzales a warning for his July 30 absence even though he left a message on the office answering machine before the beginning of his shift and gave an arguably reasonable excuse of lack of transportation. There is, therefore, no evidence that Respondent tolerated unauthorized absences. Moreover, there is no evidence Respondent had ever been faced with a situation where numerous employees discontinued work at the same time, and it is reasonable to expect Respondent to view the unanticipated and unexcused absence of a large number of its employees with even greater reprehension than isolated absences. Accordingly, I conclude Respondent would have disciplined and terminated employees for leaving work early on August 2, irrespective of their reasons for doing so and, thus, did not violate Section 8(a)(3) and (1) of the Act by issuing disciplinary notices to Gonzales, Koenig, and McCloyn and thereafter terminating Gonzales, Koenig, McCloyn, Lozano, and Palazzola. Accordingly, I shall dismiss these allegations.

D. The Refusal to Hire Clark

In refusal to hire cases, the General Counsel bears the burden under *Wright Line*[31] and *FES*[32] of showing that Respondent was hiring at the time Clark applied for employment, that Clark had experience and training relevant to the requirements of the position for hire, and that antiunion animus contributed to Respondent's decision not to hire him. *Caruso Electric Corp.*, 332 NLRB 519 fn. 2 (2000). The General Counsel has met its burden as to the first two elements but not as to the third. The sum of the credible evidence is that Clark, an overt union applicant, sought employment with Respondent on August 27, but Respondent never employed him. No evidence shows Respondent's failure to hire Clark was motivated by anti-union considerations. Although Clark appears to have tested better than some employees, a test score is only one of several factors Respondent considers in hiring employees. There is no evidence as to Clark's ranking in other factors, and Losch's interview questions and comments do not reveal antiunion animus. Rather, they suggest an entirely lawful concern that a prospective employee might not be interested in or committed to permanent employment. There is no evidence that Respondent's decision not to hire Clark was not "based on neutral hiring policies, uniformly applied [citation omitted]." *Ken Maddox Heating and Air Conditioning, Inc.*, 340 NLRB No. 7, slip op. at 3 (2003). Counsel for the General Counsel argues Respondent failed to present any "viable business justification" for failing to hire Clark. However, Respondent does not have any burden to do so unless the General Counsel first meets its burden. Since I have concluded the General Counsel has not met its initial burden, I shall dismiss this allegation.

E. The Termination of Tomas

There is no allegation that Respondent's clothing policy memo, distributed to employees on August 8, was propounded or implemented in violation of the Act. There is also no clear evidence that Respondent disparately applied the policy to employees who wore clothing with union-related logos and superscriptions. Prior to dissemination of the clothing policy memo, employees wore T-shirts with various logos and superscriptions apparently at will. After publication of the clothing policy memo the question of whether employees wore clothing with "graphics or printed text other than Quantum Electric, Inc." is disputed. Tomas, who was hired after issuance of the clothing policy memo and who signed it upon employment, said he observed other employees wearing logo-bearing or superscribed T-shirts at both the Cal Med and Long Beach sites where he worked. Losch and Cramer contended employees were not permitted to wear prohibited clothing. Both accounts may, of course, be valid. Tomar's observations may be accurate, but Respondent may have taken steps to require offending employees to comply with its clothing policy regardless of the logo or inscription content. No evidence was adduced that on occasions when employees wore nonregulation clothing, any supervisor observed it. No evidence was adduced that noncompliant employees were not warned of the consequences. No evidence was adduced of repeat offenders, which could suggest Respondent was not uniformly applying the policy. The General Counsel does not contend, and I do not find, any disparate enforcement of Respondent's clothing policy.

Notwithstanding Respondent's lack of union animus in applying its clothing policy, employees have a right under Section 7 of the Act to wear and display union insignia while at work. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801–803 (1945). Absent "special circumstances," the promulgation or enforcement of a rule prohibiting the wearing of such insignia violates Section 8(a)(1) of the Act. The special circumstances exception is narrow and "a rule that curtails an employee's right to wear union insignia at work is presumptively invalid." *E & L Transport Co.*, 331 NLRB 640 fn. 3 (2000). Respondent has not elucidated any special circumstances to justify the prohibition of employees' wearing union T-shirts. There is nothing to suggest the clothing policy is necessary to maintain production or discipline or to ensure safety. See *id.* The only possible special circumstance that might arguably apply is where display of union insignia may "unreasonably interfere with a public image which the employer has established as part of its business plan." *United Parcel Service*, 312 NLRB 596, 597 (1993). Respondent has not, however, presented evidence of that circumstance, and it cannot be inferred from the record, particularly where Respondent's employees do not normally interact with the public. Accordingly, Respondent violated

[31] *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

[32] 331 NLRB 9 (2000), affd. 301 F.3d 83 (3d Cir. 2002).

Section 8(a)(1) of the Act when its supervisors directed Tomas to reverse his union-superscribed T-shirt on penalty of discipline.

Respondent gave Tomas two opportunities to avoid discharge by reversing his union-superscribed T-shirt. He declined both and thus defied direct instructions from his supervisors. However, an employer may not discharge an employee for refusing to comply with an unlawful order prohibiting protected activity. *Kolkka Tables & Finnish-American Saunas*, 335 NLRB 844, 852 (2001); *Simplex Wire & Cable Co.*, 313 NLRB 1311, 1315 (1994). A refusal to comply with an unlawful order does not constitute "insubordination upon which a sustainable discharge [can] be based." *Kolkka*, supra, citing *AMC Air Conditioning Co.*, 232 NLRB 283, 284 (1977). Inasmuch as Respondent does not dispute its discharge of Tomas for his failure to reverse his union-inscribed T-shirt, it is unnecessary to apply the *Wright Line* analysis to this discharge. I find Respondent's discharge of Tomas violated Section 8(a)(3) of the Act.

F. Failure to Reinstate Kaspar to His Prestrike Position of Employment

Kaspar claimed to have engaged in an unfair labor practice strike when he ceased working on September 12. However, I have found the incidents on which he based his strike, i.e., interrogation of Clark, Respondent's refusal to discuss employee wages with him, and the terminations of Gonzales, Koenig, McCloyn, Lozano, and Palazzola, are not unfair labor practices.[33] Consequently, Kaspar cannot have been an unfair labor practice striker. He was, during the entirety of his strike, an economic striker, and Respondent lawfully informed him on September 12 that it intended to replace him within 3 working days.[34]

Permanently replaced economic strikers who make unconditional offers to return to work, as Kaspar did on November 19, have the right to full reinstatement when positions become available and the right to be placed on a preferential hiring list until that time. "[W]ell-settled precedent dictates that an employer will be held to violate Section 8(a)(3) and (1) of the Act if it fails to immediately reinstate striking workers on their unconditional offer to return to work, unless the employer can establish a 'legitimate and substantial business justification' for its failure to do so. See *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967)." *Capehorn Industry*, 336 NLRB 364, 365 (2001). Permanent replacement of economic strikers is such a justification, id. at 379. An economic striker who is permanently replaced thus loses his right to immediate reinstatement. *NLRB v. International Van Lines*, 409 U.S. 48, 50 (1972). Any discrimination in putting strikers back to work is, of course, a violation of the Act. *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 346–347 (1938). The employer bears the burden of proving the permanent status of hired replacements. *Capehorn Industry*, supra at slip op. 3. The question is whether Respondent permanently replaced Kaspar so as to justify its failure to reinstate him upon his November 19 unconditional offer to return to work.

In assessing whether Respondent has met its burden of proving it permanently replaced Kaspar, I have considered several circumstances: (1) The Region held the case in abeyance for nearly 6 years; some business records were not available and Losch's recall of employee hiring and placement had understandably faded. (2) I found Losch fully credible; I saw no evidence of either attempt or desire to conceal information. (3) Swanson and Losch, nonattorneys, appeared as president and secretary-treasurer of Respondent pro se and are clearly unsophisticated in the legal niceties of permanent replacement proof. (4) The question of permanent replacement arises in the context of the construction industry, the employment practices of which markedly differ from those in the manufacturing or production industry. In light of those factors, I have examined what little evidence exists regarding Respondent's replacement of Kaspar.

By letter dated September 12, when legal counsel apparently still represented Respondent, Losch informed Kaspar that he would be replaced if he did not report to work within 3 working days. Kaspar did not report to work. Respondent thereafter hired Donald Low and Stewart Gonzales on September 16 and 25, respectively, at $14 and $15.50 per hour, wages similar to Kaspar's rate of $15. When Kaspar followed up on his November 19 unconditional offer to return to work, he was informed that he had been replaced and no job was any longer available for him.[35] The wage rates of Respondent's only two hires following November 19 ($7 and $20) indicate that neither was hired for the position Kaspar had filled.

The evidence as a whole persuades me that Respondent permanently replaced Kaspar and that no opening in his position thereafter arose. Although Losch was unable to identify any employee who filled Kaspar's position as a journeyman electrician, she testified that someone from a shifting pool of electricians filled it. Respondent's hiring records show 14 employees were hired at wage rates suggestive of journeyman electrician status during the period of Kaspar's strike. While no evidence was adduced that any of those journeymen were specifically told they were permanent employees, the record is clear that Respondent hired all electricians to remain on the job until employee conduct, workflow, or job completion dictated otherwise. In the construction industry, such is about as permanent as nonsupervisory employment gets.[36] Respondent ex-

[33] As found above, the discharge of Tomas was an unfair labor practice. However, Kaspar did not claim that event as a basis for his continued strike following Tomas's October 24 discharge, and there is no evidence he knew of it prior to his November 19 offer to return to work.

[34] Although Respondent did not explain Kaspar's reinstatement rights, it was not required to do so. See *Eagle Comtronics*, 263 NLRB 515, 515–516 (1982).

[35] Losch's belief that Kaspar had earlier quit has no bearing on whether he had been permanently replaced.

[36] As Senator Humphrey, reporting from the Committee on Labor and Public Welfare (S. Rep. No. 1509, 82nd Cong. 2d Sess. (1952)) pointed out, the building and construction industry is characterized by casual, intermittent, and often seasonal employer/employee relationships on separate projects. The Board also recognized that the construction industry is one "where workers change employers from day to day or week to week." *James Luterbach Construction Co.*, 315 NLRB 976, 983 (1994).

perienced a significant decline in hiring after October. Respondent hired four employees in November but only two at a rate even approaching journeyman wages and thereafter hired two employees in December and March, respectively, neither of which was an apparent journeyman. It is reasonable to infer from these facts, and there is no evidence to gainsay, that Respondent hired a permanent replacement for Kaspar's position after he struck and that Kaspar's job was unavailable on or after the date he unconditionally offered to return to work. Accordingly, I find Respondent was justified in declining to reinstate Kaspar on and after his November 19 unconditional offer to return to work, and I shall dismiss the allegations relating to Respondent's failure to reinstate Kaspar.

CONCLUSIONS OF LAW

1. Respondent violated Section 8(a)(1) of the Act on October 24, 1996, by requiring Damir Tomas to reverse a T-shirt showing support for International Brotherhood of Electrical Workers, Local Union 441, International Brotherhood of Electrical Workers.
2. Respondent violated Section 8(a)(3) and (1) of the Act by terminating Damir Tomas on October 24, 1996 for refusing to comply with an unlawful order prohibiting protected activity.
3. Respondent did not otherwise violate the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent having unlawfully terminated Damir Tomas, it must make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of termination to the date he would have been lawfully laid off at the conclusion of work at the Long Beach and/or Cal Med sites,[37] less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[38]

ORDER

Respondent, Quantum Electric, Inc., Los Alamitos, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Prohibiting employees from wearing clothing showing support for International Brotherhood of Electrical Workers, Local Union 441, International Brotherhood of Electrical Workers, or any other labor organization.

(b) Terminating any employee for refusing to comply with an unlawful order prohibiting protected activity such as wearing clothing showing support for International Brotherhood of Electrical Workers, Local Union 441, International Brotherhood of Electrical Workers, or any other labor organization.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act

(a) Make Damir Tomas whole for any loss of earnings and other benefits suffered as a result of his unlawful termination in the manner set forth in the remedy section of the decision.

(b) Expunge from its files any reference to Damir Tomas's unlawful termination and thereafter notify him in writing that this has been done and that the termination will not be used against him in any way.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facility in Los Alamitos, California, copies of the attached notice marked "Appendix."[39] Copies of the notice, on forms provided by the Regional Director for Region 21 after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 24, 1996.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, at San Francisco, CA December 8, 2003

[37] I leave to compliance the question of whether Tomas would have been transferred to any other jobsite upon the conclusion of the Long Beach and/or Cal Med work and thus entitled to a longer period of backpay. I have not ordered Respondent to offer reinstatement to Tomas as the length of time that has transpired between the commission of the unfair labor practice and the trial of this matter make a reinstatement order impracticable and inequitable in a construction industry setting.

[38] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[39] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT prohibit employees from wearing clothing showing their support for International Brotherhood of Electrical Workers, Local Union 441, International Brotherhood of Electrical Workers or any other labor organization.

WE WILL NOT terminate any employee for refusing to comply with an unlawful order prohibiting protected activity such as wearing clothing showing support for International Brotherhood of Electrical Workers, Local Union 441, International Brotherhood of Electrical Workers, or any other labor organization.

WE WILL NOT in any like or similar manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make Damir Tomas whole for any loss of earnings and other benefits resulting from his termination.

WE WILL remove from our files any reference to the termination of Damir Tomas and WE WILL notify him in writing that this has been done and that the termination will not be used against him in any way.

QUANTUM ELECTRIC, INC.